Supreme Court, U.S.
FILED
AUG 15 1995
CLERK

(3)

No. 94-2097

IN THE SUPREME COURT OF THE UNITED STATES

October Term 1995

THOMAS SHANNON and CRAIG BROOKS,
Petitioners,

V.

CITY OF COSTA MESA, et al.,
Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

Edward J. Cooper
City Attorney, City of Santa Ana
Daivd P. Lenhardt*
Anthony J. Ferrentino
KINKLE, RODIGER & SPRIGGS
837 North Ross Street
Post Office Box 1558
Santa Ana, CA 92702
(714) 835-9011

*Counsel of Record

Counsel for Respondents - Officers William Letizio, Michael Fleet, Raul Luna, A. Bertagna, Chief Paul Walters and City of Santa Ana

August 15, 1995

LANTAGNE LEGAL PRINTING
801 East Main Street Suite 100 Richmond, Virginia 23219 (800) 847-0477

BEST AVAILABLE COPY

53 pp

QUESTION PRESENTED

1. Whether the district court abused its discretion in granting respondents' motions for summary judgment.

2. Whether the district court abused its discretion in denying petitioners' motion for relief pursuant to F.R.C.P. 59 and 60.

3. Whether respondents' motions for summary judgment should be affirmed as no genuine issues of material fact exist.

TABLE OF CONTENTS

Page

QUESTIONS PRESENTED.....i

STATEMENT OF THE CASE.....1

1. Statement of Facts.....1

A. Thomas Shannon.....1

B. Craig Brooks.....4

2. Procedural History.....5

REASONS THE WRIT SHOULD BE DENIED.....6

I. THE OFFICERS IN THIS CASE SHOULD BE GRANTED QUALIFIED IMMUNITY DUE TO THE FACT THAT THE LAW GOVERNING THE USE OF CANINES WAS NOT SUFFICIENTLY CLEAR AND THE ACTIONS OF THE OFFICERS WERE OBJECTIVELY REASONABLE 8

II. PETITIONER, BROOKS, HAS FAILED TO PROVE OR ESTABLISH THAT THE USE OF EXCESSIVE FORCE AMOUNTS TO PUNISHMENT.....10

III. PERSONS LAWFULLY ARRESTED ONLY RETAIN THEIR RIGHT TO USE SELF-DEFENSE WHEN EXCESSIVE FORCE IS BEING APPLIED.....13

Page

IV. THE DECLARATION SUBMITTED BY PLAINTIFFS' SUPPOSED EXPERTS SHOULD NOT BE CONSIDERED FOR PURPOSES OF SUMMARY JUDGMENT AND EVEN IF CONSIDERED ARE INSUFFICIENT TO WITHSTAND SUMMARY JUDGMENT.....14

TABLE OF AUTHORITIES

Page(s)

Cases

Anderson v. Creighton,
483 U.S. 635, 640.....9

Arney v. U.S.,
479 F.2d 653
(9th Cir. 1973).....15

Bell v. Wolfish,
441 U.S. 520, 535-539
(1979).....10,11

Chew v. Gates,
27 F.3d 1432, 1444, 1447
(9th Cir. 1994).....8, 9, 10

Goldberg v. U.S. Department
of State,
(D.C. Cir. 1987).....15, 16

Graham v. Connor,
490 U.S. 386, 395
(1989).....10, 11, 12

Granoff v. Merrill Lynch & Co.,
775 F.Supp. 621
(S.D.N.Y.1991).....17

Hal Roach Studios, Inc. v.
Feiner Co.,
883 F.2d 1429
(9th Cir. 1989).....14

Hamling v. U.S.,
94 S.Ct. 2887,
418 U.S. 87 (1974).....15

Page(s)

Hopkins v. Andaya,
958 F.2d 881, 885
(9th Cir. 1992).....8

Monks v. General Electric Co.,
919 F.2d 1189
(6th Cir. 1990).....15, 16

People v. Curtis,
70 Cal.2d 347, 357,
74 Cal.Rptr. 713, 719,
450 P.2d 33 (1969).....13

Sobus v. Lumbermens Mutual
Casualty Co.,
393 F.Supp. 661
(D. Md. 1975).....14

T.W. Electrical Service, Inc. v.
Pacific Electrical Contractors
Association,
809 F.2d 626, 630
(9th Cir. 1987).....16

U.S. v. Allen,
578 F.2d 236
(9th Cir. 1978).....15

Whitley v. Albers,
475 U.S. 312 (1986).....11

Constitutions and Statutes

42 U.S.C.

Section 1983.....5, 8

Page(s)

Federal Rules of Civil Procedure

Rule 20.....6
Rule 21.....6
Rule 59.....7
Rule 60.....7

Federal Rules of Evidence

Rule 703.....15
Rule 801.....18
Rule 801(c).....15
Rule 802.....15, 18

United States Constitution

4th Amendment.....8, 10, 11 ,12
8th Amendment.....10, 11
14th Amendment.....11, 12

United States District Court
Local Rules for the 9th District

Rule 76.....7

STATEMENT OF THE CASE

1. Statement of Facts

A. Thomas Shannon

Petitioner/plaintiff Shannon's complaint arises out of events surrounding his arrest on June 29, 1991. On that date, in the early morning at approximately 4:26 a.m., Officer McCarthy of the Costa Mesa Police Department saw Shannon driving 60 miles per hour on Baker Street in the City of Costa Mesa (AER 159). The officer attempted to catch up with the plaintiff (AER 159). The officer had difficulty pursuing the plaintiff because he made several sudden turns onto other surface streets (AER 159). Eventually, the plaintiff ran a red light and drove up onto the grass of a business called Arnies Manhattan Deli (AER 160). The officer pulled up directly behind the plaintiff's vehicle (AER 160). Shannon got out of his car and began to walk down the sidewalk (AER 160). Officer McCarthy told Shannon to stop, but he kept walking (AER 160). Officer McCarthy then immediately yelled "Stop, police!" (AER 160). Shannon turned to look at Officer McCarthy, shrugged his shoulders, and then ran (AER 160).

The plaintiff climbed over a 6-foot wood fence and into a drainage ditch (AER 160). He then ran down the drainage ditch and eventually climbed over a 6-foot chain link fence which was barbed on the top (AER 160). He continued to run behind an apartment complex jumping over two 7 to 8-

foot spiked wrought iron gates (AER 160). The officer last saw the plaintiff lying on his stomach on top of a wall adjacent to the backyard of a residence (AER 160).

Sergeant Durham of the Costa Mesa Police Department ran a records check on Mr. Shannon. It revealed two prior arrests for armed robbery and one arrest for burglary (AER 157). Based on Shannon's prior arrests for crimes involving the use of weapons, his evasion of Officer McCarthy, the uncertainty of Shannon's location and possibility he may be hiding among the dense foliage in the unlit back yard of a residence, Sergeant Santee requested a canine unit to assist in order to further officer safety (AER 156).

Officer Letizio of the Santa Ana Police Department thereafter arrived with his canine, Rex (RER 50). He was briefed by Officer McCarthy who told him that Shannon had last been seen going over the backyard wall of a residence (AER 161). Officer Letizio was also briefed regarding the foot pursuit and the information obtained from Sergeant Durham regarding Shannon's previous felony arrests including armed robbery. (AER 161-162, RER 164). Sergeant Santee of the Costa Mesa Police Department also told Officer Letizio of Shannon's outstanding warrants and that he requested a canine to do the search as he did not want to send officers in alone. (AER 283, RER 164).

The officers went to the residence of Ben Mobley where the suspect had last been

seen (RER 50). The officers asked for and were given permission to search Mr. Mobley's back yard (RER 54).

Officer Letizio took canine, Rex, to the back yard (RER 51). Canine announcements were made by Officer Letizio (RER 51). He yelled for the suspect to come out or else a dog would be released (RER 51). After thirty seconds, when there was no response, the canine was released to search for the suspect (RER 51). The canine eventually located the plaintiff who was hiding in dense foliage against a block wall in an area covered with oleander bushes (RER 51). The plaintiff and canine exited the oleanders. The plaintiff was hitting the canine about his head and body (RER 51). Officer Letizio ordered the plaintiff to stop fighting with the dog and put his hands in plain view (RER 51). Officers Letizio and McCarthy kept their distance due to the fact that they were still unable to determine if Shannon was armed because they were unable to instigate any type of search due to Shannon's failure to comply with orders (AER 173). When Shannon complied with the officer's instructions, the dog was taken off the bite hold and the plaintiff was arrested and transported to Western Medical Center (RER 51).

Shannon testified in his deposition he had no memory of what happened in the back yard, as he apparently was unconscious.

B. Craig Brooks

On June 25, 1991, at approximately 4:30 p.m., Officer Bertagna of the Santa Ana Police Department was sent to the area of the Fourth Street exit of the 55 Freeway in order to assist Irvine police officers in the search for an escaped prisoner who had been in custody for grand theft auto and felony hit and run (RER 114). Mr. Brooks had been taken to a hospital where he was put on an x-ray table in order to have x-rays taken (RER 108). When a police officer at the hospital was not looking, the plaintiff removed his I.V.'s and neck brace and left the hospital on foot (RER 108).

When Officer Bertagna of the Santa Ana Police Department arrived, he was advised that the suspect was last seen running through a construction area where there were many tools and objects which could have been used as weapons (RER 114).

Officer Bertagna proceeded to the area where the suspect was last seen (RER 115). Before beginning a search with the canines, Corporal Fleet and Sergeant Luna gave several canine announcements over a megaphone (RER 115). Sergeant Luna himself used a megaphone to give two canine announcements (RER 116). After two minutes, when there was no response from the suspect, police canine, Arco, was used on the leash to search for suspect, Brooks (RER 115). The police canine eventually found Brooks hiding in some thick foliage just outside the construction area (RER 115). Immediately thereafter, yelling was

heard (RER 115). The suspect came out of the bushes hitting and fighting with the dog (RER 115). Officer Bertagna instructed the suspect to stop fighting with the dog and to put his hands out in plain view (RER 115). Brooks complied and Officer Bertagna grabbed Arco by his collar and called him off the bite hold (RER 115). The suspect was immediately taken under arrest again and released in the custody of the Irvine Police Department.

2. Procedural History

On June 24, 1992 petitioners Thomas Shannon and Craig Brooks filed and served the First Amended Complaint alleging a violation of their civil rights pursuant to 42 U.S.C. Section 1983 (AER 7). In addition to their Federal civil rights claims, petitioners also alleged pendent state claims which were dismissed by the District Court on December 23, 1992 (AER 27).

Among the defendants named in the complaint were the City of Santa Ana, its Chief of Police, Paul Walters, and Officer Letizio (AER 7). Also named as defendants were City of Costa Mesa, Costa Mesa's Chief of Police, David Snowden, and Costa Mesa Police Officers Sergeant Durham, Sergeant Santee, and Officer McCarthy (AER 7). The First Amended Complaint was amended a second time to add additional Santa Ana Police Officers as defendants (AER 741).

The alleged civil rights violations of the two petitioners, Shannon and Brooks, involved different facts, circumstances, and incidents which occurred on two different days (AER 165, 289). Furthermore, no City of Costa Mesa police officers were present at, or participated in, the arrest of petitioner Brooks (AER 289). On or about November 16, 1992, the District Court determined that petitioners Shannon and Brooks were misjoined and ordered the matters severed pursuant to FRCP 20 and 21 (Appellee's Supplemental Excerpt of Record for hereinafter "ASER"). Thereafter, petitioner Shannon filed his Third Amended Complaint (ASER 19).

On or about April 14, 1993, the City of Santa Ana, its Chief Paul Walters, and Officers Letizio, Fleet, Luna and Bertagna, filed and served upon petitioner their Motion for Summary Judgment (AER 37). Thereafter, on May 5, 1993, the City of Santa Ana and its officers filed an Amended Notice of Motion for Summary Judgment (AER 144 and 148). On May 12, 1993, the Court granted the Motion for Summary Judgment brought on behalf of the Officers Letizio, Fleet, Luna and Bertagna on the grounds of qualified immunity, and continued the Motion for Summary Judgment as to the City of Santa Ana and Chief Walters (AER 202). The City of Santa Ana and Chief Walters brought a second Motion for Summary Judgment addressing all causes of action against them. This second motion for summary judgment was granted (AER 324).

On or about May 3, 1993, the City of Costa Mesa, Chief David Snowden, Sergeant Durham, Sergeant Santee, and Officer McCarthy, filed and served upon petitioner Shannon hereinafter ("Petitioner"), a Motion for Summary Judgment which was scheduled to be heard on May 24, 1993 (AER 152). According to Local Rule 76, petitioner had until May 10, 1993 to file and serve an opposition to said motion. No opposition was filed by petitioner on May 10, 1993, and on May 12, 1993, the Court vacated the May 24, 1993 hearing date, and granted the Motion for Summary Judgment in its entirety (AER 201). On May 13, 1993, petitioner brought an Ex Parte Application for leave to file late opposition to the Motion for Summary Judgment (AER 212). The Court denied the Ex Parte Application and rejected petitioner's Opposition to the Motion for Summary Judgment and Separate Statement of Genuine Issues of Fact (AER 239).

On or about June 4, 1993, petitioner filed a Motion for Reconsideration of Judge McLaughlin's May 12, 1993 orders granting the City of Costa Mesa and its officers' motion for summary judgment and the motion for summary judgment filed by the Santa Ana Police Officers (AER 240). The order was affirmed (AER 323). Thereafter, petitioner filed a Motion for Relief, pursuant to Federal Rules 59 and 60, to set aside these judgments (AER 655). This motion was denied (AER 736).

Petitioners appealed the District Court's order of July 1, 1993 granting the motion for summary judgment. The Ninth

Circuit Court of Appeals reviewed the District Court's granting of the motion for summary judgment de novo, and on February 3, 1995 the court affirmed the order of the District Court. On March 22, 1995, the Ninth Circuit Court of Appeals denied petitioner's petition for rehearing and rejected petitioner's suggestion for hearing En Banc. Petitioners are now appealing the order of the Ninth Circuit Court of Appeals.

REASONS THE WRIT SHOULD BE DENIED

I. THE OFFICERS IN THIS CASE SHOULD BE GRANTED QUALIFIED IMMUNITY DUE TO THE FACT THAT THE LAW GOVERNING THE USE OF CANINES WAS NOT SUFFICIENTLY CLEAR AND THE ACTIONS OF THE OFFICERS WERE OBJECTIVELY REASONABLE.

Initially, the petitioners' argument regarding qualified immunity focuses on whether in fact qualified immunity is available in 4th Amendment excessive force cases. They seem to attempt to draw a distinction between the decision in Chew v. Gates, 27 F.3d 1432 (9th Cir. 1994) and the decision in Hopkins v. Andaya, 958 F.2d 881, 885, footnote 3 (9th Cir. 1992). However, both courts in Chew and Hopkins recognize that officers are entitled to assert the defense of qualified immunity in Section 1983 liability claims if they reasonably believed in good faith that their actions were constitutional. Chew 27 F.3d 1432, 1444 (9th Cir. 1994); Hopkins 958 F.2d 881 (9th Cir. 1992). Whether the elements of the defense are analyzed separately or decided on the merits would

have no affect on this case since the lower court found the actions of the officers to be objectively reasonable.

Petitioners have attempted to assert that the defense of qualified immunity hinges merely on the court's previously ruling in the area of the constitutional violation alleged. However, as stated specifically in Chew v. Gates, 27 F.3d 1432, 1447 (9th Cir. 1994):

> A specific precedent is not required in order to overcome a qualified immunity defense, but the law in question must be sufficiently clear that the unlawfulness of the action would have been apparent to a reasonable official.
>
> Citing Anderson v. Creighton, 483 U.S. 635, 640.

The lower court properly found that the law governing use of canines was not sufficiently clear and any unlawfulness of the actions would not be apparent to a reasonable official with regard to these specific facts. Furthermore, the facts here did not present a situation in which a person is lying prone and handcuffed on the ground when a police canine is released. A situation in which a chase had ensued followed both Shannon and Brook's elaborate flights. Shannon had an armed felony background, hid in dense foliage, late at night in a residential back yard. Brooks escaped from police custody after being arrested for felony

drunk driving with injuries, hit and run, and hid in dense foliage after last seen running through a construction site where weapons were readily available. The officers had no opportunity to speak with plaintiffs, search them, and could only see their flight as giving rise to a concern for their own safety and the safety of others. Only after proper and unheeded warnings was a police canine released to find the subjects. Clearly, these cases pass the objective reasonableness test of Graham. These facts clearly do not give rise to any constitutional violation and as the 9th Circuit found in Chew v. Gates, any law regarding canine use in these specific types of situations, was not clearly established. Therefore, it was proper to grant qualified immunity to the individual officers in both the Shannon case and the Brooks case.

II. PETITIONER, BROOKS, HAS FAILED TO PROVE OR ESTABLISH THAT THE USE OF EXCESSIVE FORCE AMOUNTS TO PUNISHMENT.

As the Court noted in Graham v. Connor, 490 U.S. 386 (1989) page 395, footnote 10, it may be unclear whether the 4th Amendment continues to provide individuals with protection beyond the point of arrest, but it is clear "that the due process clause protects a pre-trial detainee from the use of excessive force that amounts to punishment." See Bell v. Wolfish, 441 U.S. 520, 535-539 (1979). Additionally, the Court goes on to state that after a conviction the 8th Amendment

serves as a source of protection with regards to excessive force. Id.

In the present matter, Brooks is the only petitioner who had earlier that same day been placed under arrest and then escaped. He was sought by Santa Ana officers after his escape from the custody of Irvine officers to be placed under arrest again when the alleged excessive force occurred. Therefore, Brooks is not truly a pre-trial arrestee because he has escaped custody when Santa Ana canines are called on to find him. Nevertheless, if the Court considers petitioners' second point, it is important to only look at Brooks and the facts relating to his case in this regard. It is important to note, that Brooks in his Third Amended Complaint only pleads a cause of action for violation of his 4th Amendment rights. A-9, A-10. Therefore, Brooks has only alleged a violation based on objective reasonableness whereas, the case law cited above states that a violation with regards to excessive force must prove force that amounts to punishment. This of course would be guided by the 14th Amendment substantive due process claim with regard to a pre-trial detainee and the 8th Amendment with regard to a post-trial convict. See Bell v. Wolfish, 441 U.S. 520 (1979); see Whitley v. Albers, 475 U.S. 312 (1986). As stated in Graham, the 4th Amendment only applies to claims that law enforcement officers have used excessive force in the course and arrest, investigatory stop, or the "seizure" of a free citizen. Graham v. Connor, 490 U.S. 386, 395 (1989), emphasis added.

Brooks has not pleaded any allegations of the 14th Amendment violation in his operative pleadings. Additionally, he has presented no evidence whatsoever regarding the excessive force surmounting to punishment in this case. Brooks' failure to allege any 14th Amendment violation is fatal and any other allegations on his part should not be considered.

Even if Brooks were properly able to plead a 4th Amendment violation, which the respondents deny, the actions of the officers were objectively reasonable as a matter of law which the District Court properly decided. Petitioner, Brooks, had escaped from a local hospital where he was being held on felony charges. After his escape, he had travelled through an area where construction was being done where several types of possible weapons could be gathered. The officers gave several canine warnings over a bullhorn with no response. Thereafter, the respondent officers initiated a canine search in an area where petitioner eventually was found in foliage. The petitioner exited from the foliage after a bite hold was achieved and the canine was released immediately after petitioner complied with the officers' requests. The officers' concerns for safety and the pursuit of a fleeing felon justified their actions which were objectively reasonable under the Graham v. Connor analysis. Therefore, even if the 4th Amendment was applied in this case the District Court properly evaluated such claims and granted

respondents' previous motions for summary judgment.

III. PERSONS LAWFULLY ARRESTED ONLY RETAIN THEIR RIGHT TO USE SELF-DEFENSE WHEN EXCESSIVE FORCE IS BEING APPLIED.

Initially, petitioners third question presented regarding whether a constitutional right of self-defense exists was not raised below. Petitioners did not raise any arguments regarding this issue on appeal. Because petitioners did not raise this argument below, they have waived their right to raise it now for the first time. Therefore, respondents request the Court to deny certiorari in the third question presented.

If in fact the Court reviews this issue, even though it was not raised below, it is true that both Shannon and Brooks resisted their lawful arrests by fighting and striking the canines. Both petitioners' injuries were aggravated by their own act in not complying with the officers' requests. Instead of complying, the petitioners fought against the dogs and inflicted injury upon themselves.

Petitioners' third argument in their Petition for Writ of Certiorari is that the petitioners had a right of self-defense against the canines in this instance. The premise is that a person lawfully arrested retains his or her right of self-defense against excessive force. Petitioners cite People v. Curtis, 70 Cal.2d 347, 357, 74 Cal.Rptr. 713, 719, 450 P.2d 33 (1969) for the proposition

that a person lawfully arrested still retains his or her right to self-defense against **excessive force**. Of course, each petitioner here is actively fleeing, hiding and thus resisting his apprehension by the police, as opposed to already being in custody. Regardless, respondents in this matter do not refute such a proposition that indeed a post-arrestee does retain his or her right to self-defense when in fact **excessive force** is used. Petitioners' basic untenable premise is that the use of a police canine at any time is per se excessive force. However, petitioners' argument is somewhat circular in that the District Court and the 9th Circuit Court of Appeals have both decided that there was no use of **excessive force** in this instance. Therefore, petitioners' argument in this regard is irrelevant and should not be considered.

IV. THE DECLARATION SUBMITTED BY PLAINTIFFS' SUPPOSED EXPERTS SHOULD NOT BE CONSIDERED FOR PURPOSES OF SUMMARY JUDGMENT AND EVEN IF CONSIDERED ARE INSUFFICIENT TO WITHSTAND SUMMARY JUDGMENT.

All evidence including affidavits submitted in opposition to a motion for summary judgment must be admissible under rules governing admission of evidence. Hal Roach Studios, Inc. v. Feiner Co., Inc., 883 F.2d 1429 (9th Cir. 1989). Whether summary judgment is appropriate in any case needs to be decided upon the particular facts of the case. Sobus v. Lumbermens Mutual Casualty Co., 393 F.Supp. 661 (D. Md. 1975).

Affidavits by experts who have not familiarized themselves with the record are insufficient to withstand a summary judgment motion. Monks v. General Electric Co., 919 F.2d 1189 (6th Cir. 1990); see also Federal Rules of Evidence, Rule 703, 28 U.S.C.A.

Federal Rules of Evidence, Rule 801(c) defines hearsay as any statement, other than one made by the declarant while testifying at a trial or hearing, offered into evidence to prove the truth of the matter asserted. Pursuant to Federal Rules of Evidence, Rule 802, hearsay is not admissible unless if falls within the hearsay exception.

The District Court has wide discretion in determining whether or not to admit and exclude evidence, particularly in the case of expert testimony. Hamling v. U.S., 94 S.Ct. 2887, 418 U.S. 87 (1974). On appeal from summary judgment, the reviewing court will neither approve nor consider inadmissible hearsay contained in an affidavit opposing a motion for summary judgment. Arney v. U.S., 479 F.2d 653 (9th Cir. 1973).

In order to successfully oppose a motion for summary judgment, a party must not rely on conclusory allegations in the pleadings, but must offer some evidence at least outlining a factual dispute. U.S. v. Allen, 578 F.2d 236 (9th Cir. 1978). Conclusory and general allegations in an affidavit are insufficient to support a motion for summary judgment. Goldberg v. U.S. Department of State, (D.C. Cir.

1987). Affidavits must be specific and detailed. Id. Inquiry focuses on whether the non-moving party has come forward with sufficiently specific facts from which to draw reasonable inferences about other material facts that are the necessary elements of a non-moving party's claim. T.W. Electrical Service, Inc. v. Pacific Electrical Contractors Association, 809 F.2d 626, 630 (9th Cir. 1987).

Both Dr. Meade and Van Ness Bogardus whose declarations the plaintiff relied upon, had no personal knowledge of the facts of either the Shannon or the Brooks cases. The declarations were xeroxed copies of standard declarations used in many of the plaintiffs' attorney's dog bite cases. As such, it is evident that Dr. Meade and Van Ness Bogardus have not familiarized themselves with either the Shannon or Brooks cases. Affidavits by experts who have not familiarized themselves with the record and documents available are insufficient to withstand a motion for summary judgment. Monks v. General Electric Co., 919 F.2d 1189 (6th Cir. 1990). Dr. Meade is not an expert in police canine cases and has not even personally examined any persons bitten by a police dog. The only information he puts forth, which is not specifically related to the Shannon or Brooks cases, is information which he has gathered by reviewing records made by other persons.

Van Ness Bogardus also does not have personal knowledge of either the Shannon or Brooks cases. As stated in his declaration he only relies upon four

reports one of which was made out by a canine handler who was not even involved in the incidents (AER 124). He also refers to the Santa Ana Police Department's policy of "bite and hold" when in fact the Santa Ana Police Department's policy is to "search and bark." (AER 125) He bases any and all conclusions on the comparisons to other police departments which have different policies. His opinions and conclusions are based on erroneous information. Mr. Van Ness Bogardus readily admits that he was not present and did not even bother to obtain further information from either of the plaintiffs themselves. Mr. Bogardus also does not address how any of the Santa Ana Police Department policies pertaining to police dogs' use in apprehending suspects caused the violation of Mr. Shannon's or Mr. Brooks' civil rights. Affidavits of experts submitted in a motion for summary judgment should show knowledge of opposing contentions of fact that develop during discovery and deal with those contentions. Granoff v. Merrill Lynch & Co., 775 F.Supp. 621 (S.D.N.Y. 1991).

Additionally, the declarations of Van Ness Bogardus and Dr. Meade rely extensively on hearsay. Specifically, both experts rely on information obtained from other police departments, other trainers and other third party sources not related to the case. Both Van Ness Bogardus and Dr. Meade rely on outside sources without attaching those sources to their declarations otherwise providing foundation for admissibility. Pursuant to

Federal Rules of Evidence, Rules 801 to 802, the District Court properly excluded the declaration of Van Ness Bogardus and Dr. Meade because the opinions and conclusions stated therein are based on hearsay.

Even if the declarations were admitted, they are still insufficient to withstand a motion for summary judgment in this matter. Petitioners argue in their Petition for Writ of Certiorari that the 9th Circuit panel "should not have blithely disregarded the expert declarations" (see Petition for Writ of Certiorari at Page 25) and that the "panel's refusal in this case to even acknowledge plaintiffs' evidence is inexcusable" (see Petition for Writ of Certiorari at Page 26). What petitioners have failed to recognize is that in fact the 9th Circuit Court of Appeals did review the declarations in making their decision in this case. The Court concluded that "even if the District Court erred in concluding that the declarations of Peter Meade, M.D. and Van Ness Bogardus, II were inadmissible, they were insufficient to withstand the summary judgment motions in these cases." B-12. As seen above, even if the declarations were admissible for motion for summary judgment purposes, which the defendants in this matter vehemently deny, the 9th Circuit panel has reviewed those declarations and has stated they are insufficient in this case to withstand defendants' motion for summary judgment.

Based on the foregoing, the declarations of petitioners' supposed experts in this matter are inadmissible and insufficient to withstand a motion for summary judgment. Therefore, the 9th Circuit's affirmance of the District Court's decision should be upheld.

---------- * ----------

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted.

KINKLE, RODIGER & SPRIGGS
David P. Lenhardt

Counsel of Record for Respondents, OFFICERS WILLIAM LETIZIO, MICHAEL FLEET, RAUL LUNA, A. BERTAGNA, CHIEF PAUL WALTERS and CITY OF SANTA ANA

ROBERT MANN
DONALD W. COOK
ATTORNEYS AT LAW
3600 Wilshire Blvd., Suite 1710
Los Angeles, CA 90010
(213) 252-9444

DAVID A. HUGES
ATTORNEY AT LAW
441 North Newport Blvd., Ste. 205
Newport Beach, CA 92663
(714) 722-0130

Attorneys for Plaintiff

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

Case No. CV 92 3397 LHM (CTx)
THIRD AMENDED COMPLAINT BY PLAINTIFF CRAIG BROOKS
DEMAND FOR JURY TRIAL

CRAIG BROOKS,

Plaintiff,

vs.

CITY OF SANTA ANA; CITY OF IRVINE; PAUL WALTERS, Chief of Police of the Santa Ana Police Department; LEO PEART, former Chief of Police of the Irvine Police Department; Santa Ana Police Officer ANTHONY BERTANA (#1615); Santa Ana Police Officer RAUL LUNA (#734); MICHAEL FLEET (#188); in both their personal and official capacities, and DOES 1 through 200, inclusive,

Defendants.

JURISDICTION AND VENUE

1. The claims herein are asserted pursuant to the United States Constitution and 42 U.S.C. Section 1983, et seq., and the jurisdiction of this Court is invoked pursuant to 28 U.S.C. Sections 1331 and 1343.

2. The acts complained of arose in this District, and therefore venue lies in this District pursuant to 28 U.S.C. Section 1391.

PARTIES

3. The party or parties who make this Complaint were within the jurisdiction of the United States of America at all times alleged herein.

4. All defendants are either California peace officers or California governmental entities or others whose identities are unknown to plaintiff. The defendants whose identities are unknown are sued herein under the names DOES 1 through 200 (hereinafter "DOES"). Individual police officer defendants hereinafter referred to as "police officers" and any governmental entity defendants are referred to by proper name or as "governmental entity."

5. Plaintiff is informed and believes and thereon alleges that each defendant was the agent and employee of each other defendant and was at all times acting within the scope of such agency.

FACTS COMMON TO ALL COUNTS

6. Each and every allegation set forth in each and every averment of this Complaint is hereby incorporated by this reference in each and every other averment and allegation of this Complaint.

7. Plaintiff was deprived of an interest protected by the Constitution or laws of the United States, and defendants caused any such deprivation while acting under color of state law.

8. All acts or omissions alleged to have been engaged in by any defendant are alleged to have been engaged in with evil motive and intent, and in callous, reckless, and wanton disregard of the right of plaintiff.

9. Defendants CITY OF SANTA ANA, CITY OF IRVINE, PAUL WALTERS, Chief of Police of the Santa Ana Police Department, LEO PEART, at the time the claims arose herein the Chief of Police of the Irvine Police Department, and DOES are alleged to have maintained or permitted an official policy or custom of permitting the occurrence of the types of wrongs set forth hereinbelow knowingly, with gross negligence, or with deliberate indifference and, based on the principles set forth in Monell v. New York City Dept. of Soc. Serv., 436 U.S. 658 (1978) are liable for all injuries sustained by any plaintiff as set forth hereinbelow. All governmental entities are liable under California Government Code Section 815.2.

10. On or about June 25, 1991, during the daylight hours, named Santa Ana and Irvine Police Department officers and DOES violated CRAIG BROOK'S rights to due process under both state and federal law by failing to comply with all appropriate provisions of state law, including, but not limited to Cal. Penal Code Sections 118.1, 149, 203, 205, 206, 245, and Cal. Gov't Code Section 6204, and thereby are liable to CRAIG BROOKS under 42 U.S.C. Section 1983.

11. On or about June 25, 1991 named defendants Santa Ana Police Officers and unknown named Irvine Police Department officers and DOES subjected CRAIG BROOKS to excessive, unreasonable and unnecessary force by authorizing, causing and permitting an animal trained to attack and bite humans, that is a large german shepherd dog, to attack, bite and seriously injure plaintiff. The defendants knew or should have known that Mr. Brooks was under the influence of alcohol at the time they caused and permitted the dog to attack and bite Mr. Brooks. Mr. Brooks was unconscious at the time defendants caused and permitted the dog to attack Mr. Brooks. Defendants had probable cause to arrest Mr. Brooks for non-violent crimes only. Defendants did not have probable cause to believe nor any reasonable suspicion that Mr. Brooks had committed any crime involving force or violence. Defendants did not have probable cause to believe or reasonable suspicion that Mr. Brooks was armed. Defendants knew or should have known that Mr. Brooks had been searched by police

shortly before they caused or permitted the animal to attack and bite Mr. Brooks and that Mr. Brooks was not armed in any way. Defendants knew or should have known that Mr. Brooks was dressed only in shorts. Defendants knew or should have known that causing and permitting the animal to attack and bite Mr. Brooks was likely to inflict serious physical and psychological injuries to Mr. Brooks and that the animal was capable of killing Mr. Brooks. After the animal did attack and bite Mr. Brooks, the defendants at the location of Mr. Brooks arrest stood by and permitted the animal to continue to attack and bite Mr. Brooks, causing serious and permanently disabling injuries constituting mayhem under California Penal Code Section 203 and aggravated mayhem under California Penal Code 205, by failing and refusing to stop the animal from attacking and biting Mr. Brooks because Mr. Brooks, in an effort to protect himself against extreme pain, terror, severe physical injury and potential death, attempted to defend himself against the animal's onslaught. Such excessive force caused plaintiff special and general damages, physical injuries and extreme emotional distress including but not limited to serious punctures, laceration and hematoma to Mr. Brooks's leg and buttocks and wounds to other parts of Mr. Brooks's body.

12. Defendants CITY OF SANTA ANA, CITY OF IRVINE and their respective chiefs of police are alleged to have maintained or permitted an official policy or custom of permitting the occurrence of the types

of wrongs set forth above knowingly by, among other things, permitting and authorizing dogs to search for and attack persons. Defendants CITY OF SANTA ANA, CITY OF IRVINE and their respective chiefs of police and Raul Luna, who was in charge of the Santa Ana canine program, are charged with knowing misconduct, gross negligence, or with deliberate indifference and are liable for all injuries sustained by plaintiff as set forth hereinbelow. Furthermore, the municipal entities are liable under California Government Code Section 815.2.

13. The subject policies and practices include the following:

A. The CITY OF SANTA ANA, CITY OF IRVINE and their respective chiefs of police have maintained, sanctioned and approved a policy, practice and custom of using excessive force in violation of the Fourth and Fourteenth Amendments to the United States Constitution by using dogs to bite persons.

B. The Santa Ana and Irvine Police Departments and their respective chiefs of police and Raul Luna have adopted a policy of permitting the use of a dog to take people into custody by causing a dog to attack and bite the person whenever there is a reasonable suspicion of the person's involvement in criminal activity, whether felony or misdemeanor, adult or juvenile.

Pursuant to this policy, dogs are used to apprehend persons:

(1) who are not armed;

(2) who pose no immediate threat of injury to any person.

(3) without regard to the serious injuries the dogs inflict.

C. The Santa Ana and Irvine Police Departments and their respective chiefs of police have a policy, practice and custom of permitting a dog to continue to attack and bite a person for as long as the person attempts to defend himself or herself against the dog's attack. Many if not all persons attacked by a dog instinctively attempt to defend themselves against the dog's attack. The dogs are trained to react aggressively to any such attempt by biting. When a person resists a dog's attack, the CITY OF SANTA ANA AND CITY OF IRVINE's employees are trained to strike the person who is attempting to defend himself or herself against the dog's attack until such person stops trying to defend himself or herself against the dog's attack. Also, employees are trained and permitted to let the dog continue to attack and bite a person until the person being attacked and bitten becomes passive and stops trying to defend himself or herself against the

dog's attack. As a result of such policies, practices and customs, persons apprehended by the use of a dog are subjected to extreme and excessive force resulting in severe and unnecessary permanent mental and physical injuries. The use of the dogs in the manner permitted and encouraged by defendants constitutes the commission of mayhem and aggravated mayhem under California Penal Code Sections 203 and 205 and violates Penal Code Section 149.

D. The Santa Ana Police Department does not properly select dog handlers. It does not adequately screen for persons who are prone to the use of excessive force. As a result, defendant employs dog handlers who are prone to use and do use grossly excessive force.

E. The Santa Ana Police Department does not adequately train dog handlers. Because of defendants's reckless disregard and gross negligence, dog handlers are not adequately trained to limit the amount of force which may be used to take a person into custody to that amount of force which is reasonable and necessary. As a result, defendant's dog handlers regularly use grossly excessive force.

F. The Santa Ana and Irvine Police Departments do not adequately supervise and monitor the use of dogs. Because of the disregard and

gross negligence of defendants CITY OF SANTA ANA and CITY OF IRVINE, a custom and practice exists permitting dogs to be used to intentionally and needlessly injure, disfigure, and terrorize persons, especially those persons which dog handlers believe to have attempted to avoid contact with police.

G. The Santa Ana and Irvine Police Departments fail and refuse to investigate or discipline police officers charged with misconduct, including misconduct consisting of the use of excessive force, whether such force is inflicted by deputies using their hands, fists, and feet, or whether force is inflicted through attack dogs;

H. The Santa Ana and Irvine Police Departments condone and encourage a conspiracy of silence among their employees for the purpose of concealing and furthering wrongful and illegal conduct by its employees, including but not limited to the use of unnecessary, unreasonable force, in violation of the Fourth Amendment to the United States Constitution and the Constitution and laws of the State of California.

COUNT ONE

(4th Amendment/42 U.S.C. Section 1983)

14. The conduct of each defendant violated the right of plaintiff to be secure in person, against unreasonable

searches and seizures and not to be subjected to the use of excessive force, as guaranteed by the Fourth and Fourteenth Amendments to the United States Constitution and entitles plaintiff to recover damages pursuant to 42 U.S.C. Section 1983.

Wherefore, plaintiff requests damages against each defendant as follows:

1. General damages according to proof.

2. Punitive damages according to proof (as to plaintiff's federal claims only).

3. Costs, interest, and attorneys' fees, and such other relief as is just and proper.

DATED: January 11, 1993

ROBERT MANN
DONALD W. COOK
Attorneys for Plaintiff

By /s/
Robert Mann

DEMAND FOR JURY TRIAL

Plaintiffs demand a jury trial.

DATED: January 11, 1993

ROBERT MANN
DONALD W. COOK
Attorneys for Plaintiff

By /s/
Robert Mann

PROOF OF SERVICE BY MAIL

I am a resident of the county of Los Angeles; I am over the age of 18 and not a party to the within action; my business address is 3600 Wilshire Blvd., Suite 1710, Los Angeles, CA, 90010.

On January 11, 1993 I served the within SECOND AMENDED COMPLAINT (PLAINTIFF BROOKS) on the interested parties herein by placing a true copy thereof enclosed in a sealed envelope with postage thereon fully prepaid in the United States mail at Los Angeles, California addressed as follows:

David P. Lenhardt
James W. Parker
Kinkle, Rodiger & Spriggs
A Professional Corporation
837 North Ross Street
P.O. Box 1558
Santa Ana, CA 92702

Michele Vadon-Rivera
Karen J. Schuldt
Thomas A. Kathe, City Attorney
City of Costa Mesa; and
Burke, Williams & Sorensen
611 West Sixth Street
Suite 2400
Los Angeles, CA 90017

Wood, Hyland and Francis
A Professional Corporation
Charles J. Hyland, Esq.
3070 S. Bristol Street, Ste. 190
Costa Mesa, CA 92626

I declare under penalty of perjury that the above is true and correct.

Executed on January 11, 1993 at Los Angeles, California.

/s/
Dinorah Pinelo

NOT FOR PUBLICATION
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 93-56542
D.C. No. CV-92-00397-LHM (C
MEMORANDUM*

THOMAS SHANNON; CRAIG BROOKS,

Plaintiffs-Appellants,

v.

CITY OF COSTA MESA; CITY OF SANTA ANA; PAUL WALTERS, Chief of Police of the Santa Ana Police Department; RAUL LUNA; MICHAEL FLEET; ANTHONY BERTAGNA; WILLIAM LETIZIO; DAVE SNOWDEN; PAUL MCCARTHY; ROBERT DURHAM; BURTON SANTEE,

Defendants-Appellees.

Appeal from the United States
District Court
for the Central District of California
Linda H. McLaughlin, District Judge,
Presiding

Argued and Submitted August 3, 1994
Pasadena, California
Submission Deferred August 8, 1994
Resubmitted January 5, 1995

---

* This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except as provided by 9th Cir. R. 36-3.

Before: O'SCANNLAIN, T.G. NELSON, Circuit Judges, and MERHIGE, **
District Judge.

The parties are familiar with the facts, so we need not recite them here. This appeal involves two separate cases, essentially treated by Thomas Shannon and Craig Brooks as a single case despite a district court ordering the two cases severed. The alleged civil rights violations of the two plaintiffs involved different facts, circumstances, and incidents which occurred on two different days. Santa Ana police officers were involved in both cases. Costa Mesa police officers were involved in only the Shannon case.

Brooks

Officers Bertagna, Fleet, and Luna are entitled to qualified immunity. At the time of this incident, the law was not clearly established such that reasonable officers would have known that their actions in deploying a dog and assisting in the canine search for a felony hit-and-run arrestee, who escaped from custody while at a hospital and hid in foliage near a construction zone, violated a clearly established right. See Chew v. Gates, 27 F.3d 1432, 1447-49 (9th Cir. 1994), petition for cert. filed, 63

** Honorable Robert R. Merhige, Jr., Senior United States District Judge for the Eastern District of Virginia, sitting by designation.

U.S.L.W. 3463 (U.S. Nov. 28, 1994) (No. 94-980); see also Mitchell v. Forsyth, 472 U.S. 511, 528, 535 (1985); Harlow v. Fitzgerald, 457 U.S. 800, 818 (1982). Brooks has not alleged the type of circumstances or conduct involving use of a police dog that would violate clearly established law. See Chew, 27 F.3d at 1448-49 (citing Mendoza v. Block, 27 F.3d 1357, 1362 (9th Cir. 1994) (giving example of officer siccing dog on handcuffed arrestee)).

Santa Ana Police Chief Walters is also entitled to qualified immunity. See Chew, 27 F.3d at 1446-50. Chew evaluated the issue of qualified immunity under the assumption that the "departmental policy authorized the use against all concealed suspects of dogs trained to search for and apprehend persons by biting and seizing them." Id. at 1446. In this case, Brooks was not just a concealed suspect; he was an escaped and concealed arrestee.

The City of Santa Ana, of course, would not be entitled to a qualified immunity defense. Chew, 27 F.3d at 1439. To prevail on a claim against the City of Santa Ana, Brooks must show: (1) the officers violated his constitutional rights, and (2) the City's policy caused the violation. Monell v. New York City Dep't of Social Servs., 436 U.S. 658, 690-92 (1978). Even assuming sufficient evidence of the actual municipal policy at

issue here,[1] Brooks has not demonstrated that he was deprived of federally protected rights. See 42 U.S.C. Section 1983. He contends that his Fourth Amendment rights have been violated and that he was not afforded the constitutional protections necessary under Graham v. Connor, 490 U.S. 386 (1989), and Tennessee v. Garner, 471 U.S. 1 (1985).

However, neither of these cases resolved the question of "whether the Fourth Amendment continues to provide individuals with protection against the deliberate use of excessive physical force beyond the point at which arrest ends and pretrial detention begins." Graham, 490 U.S. at 396 n.10. Graham applies to claims "aris[ing] in the context of an arrest or investigatory stop of a free citizen." Id. at 394 (emphasis added); see also id. at 395 n.10. In Garner, police shot and killed a suspect who did

---

[1] A copy of the Santa Ana Canine Policy was included in plaintiffs' belatedly filed "Index and Excerpts of Testimony and Relevant Reports in Opposition to Motion for Summary Judgment." The district court refused to consider these belatedly filed documents. The court's refusal to consider these documents is "not specifically and distinctly raised and argued" in the opening brief, and will therefore not be considered on appeal. Officers for Justice v. Civil Serv. Comm'n, 979 F.2d 721, 726 (9th Cir. 1992), cert. denied, 113 S.Ct. 1645 (1993).

not appear to be armed to prevent his escape from the scene of a burglary. 471 U.S. at 4. The use of the dog occurred in this case after Brooks had been arrested, after he escaped from police custody in the hospital, but prior to pretrial detention. Brooks has not alleged that he was subjected to excessive force amounting to punishment. See Graham, 490 U.S. at 395 n.10. Nor has he made any argument that addresses the factual distinction between his case and the prearrest situation in Graham and Garner.

"[Section] 1983 is not itself a source of substantive rights, but merely provides a method for vindicating federal rights elsewhere conferred." Graham, 490 U.S. at 393-94 (internal quotations omitted). The Fourth Amendment analyses in Graham and Garner do not confer federal rights on Brooks, an escaped felony arrestee, that can serve as a basis for Monell liability. Compare Chew, 27 F.3d at 1439-43; cf. Robins v. Harum, 773 F.2d 1004, 1009-10 (9th Cir. 1985) (a pre-Graham case which held that excessive force by law enforcement official in the course of transporting an arrestee gives rise to a section 1983 claim based upon a Fourth Amendment violation).

Brooks has not alleged a constitutional basis for his section 1983 claim. There is no basis, therefore, for the imposition of Monell liability on the City of Santa Ana. See Monell, 436 U.S. at 690-92; see also Los Angeles v. Heller, 475 U.S. 796, 799 (1986) ("If a person has suffered no constitutional injury at the

hands of the individual police officer, the fact that the departmental regulations might have authorized the use of constitutionally excessive force is quite beside the point.").

The district court properly granted summary judgment in favor of Officers Bertagna, Fleet, Luna, Chief Richardson and the City of Santa Ana.

Shannon

Even if the district court erred in granting summary judgment to Santa Ana Officers Letizio and Luna "without notice," because the notice of motion was amended to name the individual officers after Shannon had filed his opposition papers, we affirm the order. Officer Luna, who is in charge of the Santa Ana canine program, and who is alleged in Shannon's complaint to have been involved in adopting the policy, is entitled to qualified immunity just as was Captain McKinley in Chew, who had overall supervisory responsibility for the L.A.P.D. canine program. Chew, 27 F.3d at 1446. Officer Letizio, the canine handler, is entitled to qualified immunity because the law governing his conduct was not clearly established at the time of Shannon's arrest. Id. at 1447-50. Shannon has not alleged the type of circumstances or conduct that would violate clearly established law. See Chew, 27 F.3d at 1448-49. We note that although the district court granted summary judgment to Officers Fleet and Bertagna as well, these officers were not

named in Shannon's Third Amended Complaint.

Santa Ana Police Chief Walters is immune from suit under the qualified immunity doctrine. Chew, 27 F.3d at 1446-50. This leaves the question of the liability of the City of Santa Ana. Even assuming adequate evidence of the actual policy at issue in this case,[2] application of the Graham factors supported the decision to use canine force to arrest Shannon. Cf. Chew, 27 F.3d at 1441-43.

In determining whether the use of force to effect a seizure is reasonable, "the nature and quality of the intrusion on the individual's interests" must be balanced against "the countervailing government interests at stake." Graham, 490 U.S. at 396 (internal quotation omitted); see also Chew, 27 F.3d at 1440. Three factors are considered in weighing the governmental interests involved: (1) "the severity of the crime at issue," (2) "whether the suspect poses an immediate threat to the safety of the officers or others," and (3) "whether he is actively

---

[2] See n.1, supra. Shannon also points out that in response to requests for admission, the City of Costa Mesa stated that the use of the dog to find and bite him was in accordance with the policies and practices of the City of Costa Mesa Police Department and pursuant to the authorization and directives of Costa Mesa Police Chief Snowden and Santa Ana Police Chief Walters.

resisting arrest or attempting to evade arrest by flight." Graham, 490 U.S. at 396 (citing Garner, 471 U.S. at 8-9).

These factors "are not to be considered in a vacuum but only in relation to the amount of force used to effect a particular seizure." Chew, 27 F.3d at 1441. In Chew, we considered but did not decide whether the use of dogs trained to bite and seize amounts to deadly force. Id. at 1435, 1442. If such use does amount to deadly force, it might be unconstitutional to employ dogs in circumstances like those in Garner. 471 U.S. at 3; see also Chew, 27 F.3d at 1452-53 (Norris, J., concurring in part and dissenting in part). The facts before us, however, are unlike those of Garner or Graham.

Shannon, who was seen by police speeding and running red lights at 4:30 a.m., pulled up onto the lawn of a restaurant and fled from police on foot, climbing five fences (including three that were between six and eight feet high and one that was barbed at the top), to hide in oleander bushes in the backyard of a house in a residential area. Construing the evidence in the light most favorable to Shannon, Santa Ana Officer Letizio was not informed about the outstanding warrants, or the nature of the warrants. However, the record reveals that it was undisputed that Letizio was told that Shannon had prior arrests for armed robbery. The Declaration of Robert Mann, relied upon for the assertion that this fact was disputed, speaks to Letizio's

alleged knowledge of the warrants, not the armed robbery arrests.

"Where the officer has probable cause to believe that the suspect poses a threat of serious physical harm, either to the officer or to others, it is not constitutionally unreasonable to prevent escape by using deadly force." Garner, 471 U.S. at 11. Even assuming that the use of dogs trained to bite and seize constitutes the use of deadly force, we hold that the use of the dog in this case, by officers wishing to prevent harm to themselves and residents in the area, was objectively reasonable.

Review of the Graham factors leads to the same conclusion. The most important element, "whether the suspect poses an immediate threat to the safety of the officers or others," Chew, 27 F.3d at 1441, weighs against Shannon. Although Shannon, like Chew, was initially stopped for a traffic violation, Chew stopped for police, produced his driver's license, and spoke with police before his flight. Id. at 1442. As described above, Shannon's situation was different. Furthermore, Shannon hid in a residential backyard, not a commercial junkyard. The safety of the residents of the area also had to be considered. Unlike the situation in Chew, there is no material fact question about the immediate safety threat posed by Shannon. Compare id.

The other two Graham factors also weigh in favor of the government. As in Chew, an edge goes to the government on

whether Shannon was "actively resisting arrest" when he hid in the bushes and did not come out after a canine announcement. See id. When looked at in isolation, the severity of the crime (speeding and running red lights) seems somewhat minimal. However, there was also Shannon's immediate and somewhat elaborate flight, as well as the information given to Letizio that Shannon had been arrested for armed robbery.

We conclude that in Shannon's case it is appropriate to determine as a matter of law that it was reasonable for Officer Letizio to release the dog. Accordingly, there is no basis for Monell liability to be imposed upon the City of Santa Ana. Monell, 436 U.S. at 690-92; Heller, 475 U.S. at 799. The district court's grant of summary judgment to the City of Santa Ana is affirmed.

Shannon filed his opposition to the summary judgment motion of the Costa Mesa defendants three days late. The district court granted the summary judgment motion on the ground that Shannon filed no opposition. Summary judgment is not an acceptable sanction for failure to abide by a local rule. Marshall v. Gates, No. 93-55022, slip op. at 105-06 (9th Cir. Jan. 4, 1995). However, unlike Chief Gates' papers in Marshall, the Costa Mesa defendants met their burden of demonstrating an absence of genuine issues for trial. Id. at 106. We therefore affirm the grant of summary judgment to the Costa Mesa defendants.

Costa Mesa Police Sergeant Santee, who requested a Santa Ana canine officer and who Shannon also contends had a duty to intervene in the dog attack, is entitled to qualified immunity. The law governing his conduct was not clearly established at the time of Shannon's arrest. Chew, 27 F.3d at 1447-50. Officer McCarthy, who initially followed Shannon on foot and who Shannon contends had a duty to intervene in the dog attack, is also entitled to qualified immunity. Id.

To the extent that Shannon alleged that Sergeant Durham authorized, caused and/or permitted the use of the dog, he is entitled to qualified immunity. Id. Shannon also predicated Durham's liability on his alleged fabrication of Shannon's criminal history and the broadcast of this information to the officers in the field. However, while Shannon's opposition attempted to set forth many factual questions concerning Shannon's "arrest package," it failed to support the fabrication claim, or the claim that Shannon's prior history was unknown to officers at the time the dog was used to search for him. Shannon failed to meet his summary judgment burden on this point, see Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 249 (1986), and Durham is entitled to summary judgment.

Costa Mesa Police Chief Snowden is entitled to qualified immunity. Chew, 27 F.3d at 1446-50. Because there is no basis for Monell liability to be imposed upon the City of Santa Ana, there is no

basis for such liability to be imposed upon the City of Costa Mesa.

The Declarations and The State Law Claims

Even if the district court erred in concluding that the declarations of Peter Meade, M.D., and VanNess Bogardus, III, were inadmissible, they are insufficient to withstand the summary judgment motions in these case.

Under the circumstances, it is not necessary to remand the dismissal of the state law claims to the district court for a reexamination of the four categories enumerated in 28 U.S.C. Section 1367(c) in accordance with Executive Software N. Am., Inc. v. United States Dist. Ct., 24 F.3d 1545 (9th Cir. 1994). First of all, the district court properly dismissed all claims over which it had original jurisdiction. See 28 U.S.C. Section 1367(c)(3). To require a remand for the court to specify subsection 1367(c)(3) as a specific ground for dismissal based on Executive Software (decided after the district court's order in these cases), would elevate form over substance. More importantly, the district court properly dismissed the state law claims without prejudice because they were insufficiently pleaded. Although Shannon and Brooks contended at oral argument that they should have been given leave to amend, they did not make this argument in their opening brief. The issue is therefore waived. Officers for Justice v. Civil Serv. Comm'n, 979 F.2d 721, 726 (9th Cir.

1992), cert denied, 113 S.Ct. 1645 (1993).

CONCLUSION

We have considered the other arguments made by the appellants and conclude that no discussion is necessary. The summary judgments in favor of the defendants in the cases brought by Brooks and Shannon are AFFIRMED.

AFFIRMED